

the 17 day of October 2003  
TESTE: LILLIE M. HART, CLERK 8:00am  
By [Signature] D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA )

vs. )

LEE BOYD MALVO )

Criminal Nos. CR 03-3089, CR 03-3090  
& CR 03-3091

COMMONWEALTH'S MEMORANDUM IN OPPOSITION TO ADDITIONAL  
DEFENSE FUNDS FOR DAILY AND/OR EXPEDITED TRIAL TRANSCRIPTS  
FROM CODEFENDANT'S TRIAL

The defendant Malvo has moved the Court to provide him with transcripts of the trial of the codefendant, John Allen Muhammad, "to be provided to the Defendant at the conclusion of each day of testimony." If the Court grants this extravagant request, it will be at a cost to the taxpayers of approximately \$2,000.00 to \$2,500.00 per diem.

Malvo asserts that his constitutional rights under the Fifth, Sixth and Fourteenth Amendments would be "substantially abridged" without these daily transcripts. However, he does not cite any of the case law that might provide a framework for the Court's analysis. As a matter of law, constitutional guarantees of due process and equal protection do entitle indigent defendants to "the basic tools" necessary to prepare an adequate defense on appeal. Griffin v. Illinois, 351 U. S. 12, 17 (1956). Following Griffin, the Supreme Court of Virginia found that an indigent defendant had a constitutional right to a free transcript in order to perfect his appeal. Cabaniss v. Cunningham, 206 Va. 330, 334-35 (1965). However, Cabaniss involved an indigent defendant who could not perfect his appeal without submitting a transcript; to deny him the transcript was tantamount to denying him the ability to appeal at all. None of the reasons proffered in Malvo's Motion allege that the absence of transcripts will render him unable to mount any part of his defense; he is not in a

Cabaniss situation.

Instead, Malvo would merely prefer to have transcripts of witness testimony (and, on the face of the Motion, he would prefer all witness testimony, even if they will not be called in his own case).

The reasons he would prefer the transcripts are (1) his several attorney's want to attend the codefendant's trial but everyone on his legal team may be too busy to see all of it; and (2) he wants to verify that the witnesses testify consistently. Higher courts have considered those sorts of arguments in the past. In Faison v. Zahradnick, 563 F.2d 1135 (4th Cir. 1977) the Fourth Circuit considered the general rule that indigent defendants should not be denied a transcript if it would be available for a fee to a paying defendant. See generally, Roberts v. LaVallee, 389 U. S. 40 (1967) (involving preliminary hearing transcripts). The Fourth Circuit distinguished this rule, noting that in Virginia the testimony of a preliminary hearing is transcribed only if a Judge ordered it; where a Judge did not do so, no official transcript would be available to anyone and therefore the indigent defendant had no right to one. The Fourth Circuits reasoning was cited with approval in Young v. Commonwealth, 218 Va. 885, 887-888 (1978) (no violation of indigent defendant's constitutional rights where recording device malfunctioned and preliminary hearing transcript could not be made). The rational articulated in Faison v. Zahradnick is applicable in the case at bar. No official transcripts of the codefendant's trial will ever exist unless, at some point, a judge orders it or, are produced on appeal. Malvo is requesting this Court to generate on a daily basis that which would not otherwise exist under normal procedures.

The Fourth Circuit's rule provides an important caveat to the case of United States v. Sheppard, 559 F. Supp. 571 (ED Va. 1983) (granting defendant a free transcript of his codefendant's trial). The transcript in Sheppard was almost certainly available since the trial had already occurred and had been contested.

In determining whether a defendant needs a free transcript, two factors are relevant: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same functions as a transcript. Anderson v. Commonwealth, 19 Va. App. 208, 211-212 (1994) citing Britt v. North Carolina, 404 U. S. 226, 227 (1971) (defendant entitled to transcript of his previous mistrial because eyewitness had been seriously impeached during first trial). Since the codefendant's trial has not even commenced, there can be no serious argument that anyone has been impeached. Indeed, it is a virtual certainty that the vast bulk of the evidence will be uncontested in this case. The notion that the witnesses will be anything other than truthful appears to be a groundless claim, with Malvo offering no evidence at all in support of it. Indeed, the crux of Malvo's Motion appears to be the unsupported assertion that he is entitled to transcripts of the codefendant's trial as a matter of constitutional right, with or without a supporting rationale. That is not the law in Virginia. See generally Krieger v. Commonwealth, 38 Va. App. 569, 585 (2002) (the Court's decisions concerning access to transcripts involve a necessary case-by-case analysis). In Martin v. Commonwealth, 221 Va. 436 (1980) the Virginia Supreme Court rejected a defendant's contention that he had a due process right to a daily transcript of the proceedings in the trial court, and cited with approval the language in Walle v. Sigler, 456 F. 2d 1153, 1156 (1972):

Nothing in any of the Supreme Court cases that have come to our attention even remotely suggests the novel idea that [that an indigent defendant] has the right to a daily transcript. We decline to adopt such an idea here.

Malvo's belief in the value of the transcripts is wholly speculative, since he does not know what the content of the transcripts might be. His position is wholly distinguishable, and infinitely more speculative, than that of the defendant's who have received court ordered transcripts. See e.g. Harley v. Commonwealth, 25 Va. App. 342 (1997) (denial of defendant's request for suppression

hearing transcript was harmless error). The Motion should be denied.

Respectfully submitted,

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ROBERT F. HORAN, JR.  
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Memorandum was sent via facsimile and mailed first class to Michael S. Arif, Counsel for Defendant, 8001 Braddock Road, Suite 105, Springfield, VA 22151 and Craig S. Cooley, Counsel for Defendant, 3000 Idlewood Avenue, P. O. Box 7268, Richmond, VA 23221, this 16th day of October, 2003.

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ROBERT F. HORAN, JR.  
Commonwealth's Attorney